Cutter of Maui, Inc. *and* International Longshore and Warehouse Union, Local 142, AFL–CIO. Case 37–CA–6521–1

July 29 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On March 24, 2005, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has considered the decision and the stipulated record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings and conclusions and to adopt his recommended Order.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Cutter of Maui, Inc., Kahului, Maui, Hawaii, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. July 29, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Meredith A. Burns, Esq., for the General Counsel.
Christopher S. Yeh, Esq. and Barry W. Barr Esq. (Marr, Hipp, Jones & Wang), of Honolulu, Hawaii, for the Respondent.
Rebecca L. Covert, Esq. (Takahashi Masui, Vasconcellos & Covert) of Honolulu, Hawaii, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. On September 10, 2003, International Longshore and Warehouse Union, Local 142, AFL–CIO (the Union) filed the charge in this case against Cutter of Maui, Inc. (Respondent or the Employer). On June 30, 2004, the Regional Director for Region 20 of the National Labor Relations Board (the Board) issued a complaint against Respondent. The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing and refusing to recognize and bargain with the Union and failing and refusing to furnish information requested by the Union that was relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of an appropriate unit of Respondent's employees. The Respondent filed a timely answer in which it denied that it had violated the Act. On February 3, 2005, before the scheduled hearing in this case commenced, the parties jointly waived a hearing and agreed to have the case decided on the basis of a stipulated record.

Based on the stipulated record submitted by the parties, and after considering the briefs, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS

JURISDICTION

At all times material, Respondent, a Hawaii corporation with a place of business in Kahului, Maui, Hawaii, has been engaged in the retail sale, maintenance and repair of automobiles. During the calendar year ending December 31, 2002, Respondent derived gross revenues in excess of $500.000. During the same time period, Respondent purchased and received goods valued in excess of $5,000 that originated from outside the State of Hawaii. At all times material, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

On January 10, 2003, the Regional Director for Region 20 conducted an election in Case 37–RC–4033. Pursuant to that election, on January 21, 2003, the Regional Director certified the Union as the exclusive collective-bargaining representative of Respondent's employees in the following appropriate unit:

> All maintenance, parts and service employees employed by Respondent, excluding automobile salespersons, outside parts salespersons, dispatchers, service writers, office clerical employees, guards and supervisors as defined in the Act.

On April 17, 2003, the Union's vice president, Robert G. Girald wrote the Respondent's general counsel, Jan Wiedman, requesting that the parties commence bargaining immediately. In this letter Girald also requested that the Employer provide

[1] Chairman Battista notes that he joined the majority in denying the Respondent's request for review of the Regional Director's supplemental decision in Case 37–RM–177 solely because the 8(a)(5) complaint was pending. He recognizes, however, that because the majority addressed the merits of the Respondent's arguments there the Board's disposition of that case precludes the relitigation of the merits here.

the Union with certain information regarding the bargaining unit employees. On May 9, 2003, Weidman wrote Girald stating that the workplace for the bargaining unit had been sold and, therefore, it would be unlawful for the Employer to recognize and bargain with the Union.

Also on May 9, Respondent filed a petition with the Board in Case 31–RM–177 seeking an election for the parts and service employees at its dealership at 237 Dairy Road, Kahului, Maui.[1] On June 9, 2003, the Regional Director administratively dismissed the petition in Case 37–RM–177 on the ground that the petition was filed within the 1-year certification period of Case 37–RC–4033. On June 20, Respondent filed a request for review of the Regional Director's dismissal of the petition in Case 37–RM–377 with the Board in Washington, D.C.[2]

On July 14, Girald wrote Wiedman again asking that Respondent bargain with the Union and provide the Union with the requested information. On July 25, Wiedman answered that Respondent had filed a request for review with Board in the representation case and would defer responding to the Union pending the review.

On August 27, the Board granted Respondent's Request for Review in Case 37-RM-377 and remanded the case for a hearing and supplemental decision. On September 10, 2003, the Union filed the instant unfair labor practice charge. On February 2, a hearing took place before a Board hearing officer in Case 37–RM–77.

On June 20, 2004, the Regional Director issued the instant unfair labor practice complaint. On September 7, the Regional Director issued a supplemental decision and order in Case 37–RM–377 dismissing the petition on the basis that it was filed within the one-year certification period in Case 37–RC–4033. The Employer contended that no certification bar existed because of the sale of its Hana dealership and relocation of its parts department. The Regional Director found that "despite the reduction in the number of employees and product lines that has taken place . . . there has been a substantial continuity in the bargaining unit and that a certification bar remained in effect after the relocation to the new facility."

On October 4, 2004, Respondent filed a request for review of the dismissal of its petition in Case 37–RM–377. On October 20, 2004, the Board denied the Respondent's request for Review, on the grounds that "it raises no substantial issues warranting review."

[1] On March 31, 2003, the Employer sold part of its dealership located on Hana Highway (the workplace of the unit employees at the time of the certification) and transferred the unsold portion of the dealership to its Kahului location. On April 1, 2003, the Employer began operating a new service department on Dairy Road. The new service department employed only 15 employees as opposed to the 35 employees employed at the Hana facility. The 15 employees at the Dairy Road service department had been previously employed by Respondent at its Hana location.

[2] Official notice is taken of the "record" in the representation proceedings, 37–RC–4033 and 37–RM–377, as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).

III. CONCLUSIONS

This is a refusal to bargain case in which Respondent is contesting the certification in an underlying representation case, 37–RC–4033. The only difference from the usual test of certification case is that in the instant case Respondent attacked the certification collaterally by filing a petition in Case 37–RM–377. As stated above, Respondent has refused to bargain with the Union based on the sale of its Hana dealership and relocation of its parts and service department. This issue was raised by the Respondent and litigated in the representation proceeding in Case 37–RM–377. In the instant unfair labor practice case, Respondent did not offer any newly discovered and previously unavailable evidence, nor does Respondent allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.

Section 102.67(f) of the Board's Rules and Regulations precludes relitigating "in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding." The Board has stated that "[s]ubsequent unfair labor practice cases 'related' to prior representation proceedings include not only Section 8(a)(5) refusal-to-bargain cases where there is a test of certification, but also, in appropriate circumstances, unfair labor practice cases that arise under other sections of the Act." *Hafadai Beach Hotel*, 321 NLRB 116 (1996). In the instant case, the relocation issue raised by the Respondent was litigated in the prior representation proceeding. I therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See, *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, I am bound by the Board's findings in the representation case.

Accordingly, the record shows that Respondent failed and refused to bargain collectively with the exclusive-bargaining representative of its maintenance, parts and service employees, in violation of Section 8(a)(1) and (5) of the Act. I find no merit to Respondent's argument that it merely deferred bargaining with the Union. As Respondent was challenging a recent Board certification, it was clearly doing so at its own risk.[3] There is no evidence that Respondent began bargaining after the Board denied its request for review on October 24, 2004. Rather, Respondent is still contending that it is not obligated to recognize or bargain with the Union based on changes in the bargaining unit, which occurred in March and April 2003.

Further, since April 17, 2003, and July 14, 2003, the Union has requested the Respondent to furnish information relevant to the Union's performance as exclusive collective-bargaining representative of the unit employees. Since April 17, 2003, the Respondent has refused to bargain with the Union and has refused to furnish the Union with the requested information. I find that these refusals constitute unlawful refusals to bargain in violation of Section 8(a)(5) and (1) of the Act.

[3] Cf. *W.A. Kreuger Co*., 299 NLRB 914 (1990); *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974) enf. denied other grounds 512 F.2d 684 (8th Cir. 1975).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act, by failing and refusing on and after April 17, 2003, to meet and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit.

4. The Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act, by failing and refusing to furnish the Union requested information relevant for purposes of collective bargaining.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease-and-desist, to meet and bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. I also recommend that Respondent be ordered to furnish the Union the information requested in its letters of April 17 and July 14, 2003.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, the Board shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962) ; *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir.1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended[4]

ORDER

Respondent, Cutter of Maui, Inc., Kahului, Maui, Hawaii, its officers, agents, successors and assigns shall

1. Cease and desist from:

(a) Failing and refusing to meet and bargain with International Longshore and Warehouse Union, Local 142, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) Refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, meet and bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All maintenance, parts and service employees employed by Respondent, excluding automobile salespersons, outside parts salespersons, dispatchers, service writers, office clerical employees, guards and supervisors as defined in the Act.

(b) Furnish to the Union in a timely fashion the information it requested in its letters of April 17 and July 14, 2003, which information is relevant and necessary to its role as the exclusive representative of the unit employees.

(c) Within 14 days after service by the Region, post at its facilities in Maui, Hawaii, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 17, 2003.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated , San Francisco, California, March 24, 2005.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain with International Longshore and Warehouse Union, Local 142, AFL–CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the appropriate bargaining unit:

> All maintenance, parts and service employees employed by us, excluding automobile salespersons, outside parts salespersons, dispatchers, service writers, office clerical employees, guards and supervisors as defined in the Act.

WE WILL furnish to the Union in a timely fashion the information it requested in its letters dated April 17 and July 14, 2003, which information is relevant and necessary to its role as the exclusive collective-bargaining representative of the unit employees.

CUTTER OF MAUI